No. 85-1583

Supreme Court, U.S.
FILED
MAY 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

JOHNS-MANVILLE SALES CORPORATION AND RAYBESTOS-MANHATTAN, INC.,
Petitioners,

vs.

JAMES LEROY JACKSON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

James L. Jackson was employed at the Ingalls Shipyard in Pascagoula, Mississippi for approximately eighteen years. During that time he was exposed on a daily basis to dust from asbestos insulation products manufactured by the petitioners and others. At no time during his employment at Ingalls was Jackson warned that breathing asbestos dust might be harmful to his health. Approximately seven years after leaving Ingalls Jackson was diagnosed as having asbestosis, an incurable and progressive disease of the lungs caused by inhaling asbestos fibers.

Jackson filed suit on December 15, 1978 invoking the diversity jurisdiction of the federal court and seeking com-

pensatory and punitive damages against twelve defendants who manufactured the asbestos-containing materials to which he was exposed. Jackson settled with all but four defendants before trial and with one defendant during trial. His case against the remaining defendants was tried before a jury in May and June, 1982, on a theory of failure to warn under strict liability.

At trial, Jackson offered evidence that he was permanently disabled and his condition was expected to worsen. Estimates of his present disability ranged from fifteen to seventy percent. Several of Jackson's medical experts testified that based upon reasonable medical probabilities Jackson would contract cancer as a result of his condition and exposure to asbestos.

Jackson also offered evidence that as early as the 1930's these petitioners knew that asbestos was harmful, yet for decades followed a deliberate and calculated policy of concealing this information from the public by various means of deception and misrepresentation. The defendants denied that Jackson had asbestosis and contended that they were unaware that asbestos was harmful during the time of Jackson's exposure. Confronted with this record, the trial judge allowed the jury to consider awarding punitive damages which is permitted under Mississippi law for conduct "so gross as to indicate reckless or wanton disregard for the safety of others."

As required under Mississippi law, Jackson offered evidence of the financial worth of these petitioners in support of his request for punitive damages. The petitioners offered no evidence of their inability to pay punitive damages or of the number or amount of punitive damage

awards assessed against them. They took the position, which they have maintained throughout this litigation, that punitive damages should not be allowed as a matter of law regardless of the extent of their misconduct. On June 3, 1982 the jury found in favor of one defendant and awarded Jackson actual and punitive damages against these petitioners.

SUMMARY OF ARGUMENT

The Fifth Circuit, sitting en banc, correctly concluded that it would be entirely inappropriate to create a federal common law of asbestos litigation. The decisions of this Court make clear that the instances of federal judicial law-making are "few and restricted" and require "congressional authorization to formulate substantive rules of decision" or a "uniquely federal concern." Neither is present in this case.

The decision below is buttressed by considerations of federalism and separation of powers. In the absence of a congressional or constitutional directive, federal courts should not intrude on legitimate spheres of state authority. As the Fifth Circuit sensibly decided, the challenge of the asbestos litigation is one that Congress should face or be left to the states.

Finally, this Court should decline the petitioners' invitations to draft an asbestos litigation statute. The pitfalls of attempting to do so are infinite and evidence

abounds that progress is being made on managing these difficult cases on other fronts.

REASONS FOR DENYING THE WRIT

1. This Court's Precedents Make It Clear That There Is No Basis For Creating A Federal Common Law Of Asbestos Litigation And The Decision Below Should Not Be Disturbed.

Any discussion of federal common law must begin with *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), in which this Court established that federal courts do not have the general lawmaking powers exercised by state courts. *Erie* held that because the federal courts are courts of limited jurisdiction: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. * * * There is no federal general common law." 304 U.S. at 78. It is true that since *Erie,* this Court has recognized "a responsibility in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern." *Northwest Airlines, Inc. v. Transport Workers Union of America,* 451 U.S. 77 (1981). These instances, however, are "few and restricted." *Wheeldin v. Wheeler,* 373 U.S. 647 (1963). Even with respect to the kinds of cases that do raise issues of "uniquely federal concern," this Court has recently stated:

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned

> with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

Although petitioners concede that Congress has yet to take any action to remedy the problems of asbestos exposure, so that there is no "congressional authorization to formulate substantive rules of decision," they imaginatively argue that the potential conflict among plaintiffs for the limited resources of the asbestos companies is analogous to the interstate conflicts over water rights and pollution that have been held to involve uniquely federal interests. They necessarily rely on *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), and *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Both cases are inapposite because they involved a conflict between states as quasi-sovereign bodies over shared resources. Under those circumstances, a single state's statutes or decisions could not be considered conclusive. In the realm of asbestos litigation, on the other hand, any conflict among plaintiffs, even assuming one to exist, may transcend state lines but does not involve the rights and

duties of states as political entities.[1] Clearly, if federal courts are to remain courts of limited powers as *Erie* requires, a dispute over a common fund or scarce resources cannot become "interstate," in the sense of this Court's *Texas Industries* opinion, merely because the conflict is not confined within the boundaries of a single state.

Petitioners also argue that there is a uniquely federal interest "in preventing the unregulated exhaustion of finite compensatory resources" by awards under state law. (Pet. 17) They claim that the "inevitable" result of what they call "this interstate judicial fiasco" will be (1) the preference of present over future claimants; (2) the financial ruin of a national industry; and (3) an ultimate burden on the federal purse. With continued clairvoyance they assert that this triumvirate of horribles would be substantially lessened by the creation of federal rules restricting the types of damages recoverable in asbestos suits.

Petitioners misconceive the nature of the uniquely federal interest requirement. "Uniquely federal interests" are not merely national or important concerns, and the existence of these concerns, no matter their significance, cannot by themselves give federal courts the authority to supersede state policy. Indeed, as this Court recently stated, "[t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal

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[1]Some conflict over the resources of the asbestos industry would not be among plaintiffs in different states but among plaintiffs in the same state or among past, present and future plaintiffs.

judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981) (Milwaukee II). The court below was entirely correct in concluding that to be "uniquely federal" and thus a sufficient predicate for the imposition of a federal substantive rule, an interest "must relate to an articulated congressional policy or directly implicate the authority and duties of the United States as sovereign." 750 F.2d at 1325. Far from being "unfounded," as petitioners assert, this Court's decisions clearly support the Fifth Circuit's statement. See, e.g., *Texas Industries, supra*, at 641 (authority and duties of United States must be "intimately involved"); *Northwest Airlines, supra*, at 95 (uniquely federal concern is "the definition of rights and duties of the United States"), *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (federal law governs rights of United States arising under nationwide federal program); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (federal common law governs rights and duties of United States on commercial paper which it issues).

Neither exists in the asbestos context. Although individual members and committees of Congress have expressed concern about asbestos litigation, see Product Liability Act, S. 44, 98th Cong., 1st Sess. (1983); *Occupational* Disease Compensation Act of 1983, H.R. 3175, 98th Cong., 1st Sess. (1983); Asbestos Workers Recovery Act of 1984, S. 2708, 98th Cong., 2d Sess. (1984), Congress itself has yet to formulate any policy on this issue. Moreover, petitioners have been unable to point to any substantial right or duty of the federal government that would

be directly affected by this litigation's outcome. Any effect state law recoveries eventually might have on the "federal purse" is far too indirect and hypothetical to justify the imposition of federal common law. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987, 993 (2d Cir. 1980) (no federal policy at stake in war veterans' action against manufacturers of defoliants used in Vietnam War that is sufficient to warrant creation of federal common law), *cert. denied*, 454 U.S. 1128 (1981); *cf. Miree v. DeKalb County*, 433 U.S. 25, 29-32 (1977) (federal interest in air travel insufficient basis for creation of federal law in action between private parties that will have no direct effect on United States or its treasury); *Bank of American National Trust & Savings Ass'n v. Parnell*, 352 U.S. 29, 33-34 (1956) (interest of government too speculative and remote in action between private parties that does not touch rights and duties of the United States). Similarly, ensuring the availability of compensation for injured plaintiffs, whether present or future, is predominately a matter of state concern and, in the absence of congressional enactments, state law, both as to the extent of compensation and the availability of punitive damages, must apply. As recently as two years ago, this Court reaffirmed this basic principle of American federalism when it stated in a related context: "Punitive damages have long been a part of traditional principles of state law. As noted above, Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

The court below was correct in characterizing petitioners' invocation of federal common law as little more

than a request that federal judicial power be exercised on the basis of the federal courts' own interest in "doing justice." Although federal courts may have an institutional interest in maintaining a federal judicial system that is fundamentally "just," such an abstract, all-encompassing interest is not a sufficient basis upon which to rest the displacement of state law. First, implicit in *Erie* is the idea that in diversity actions federal court concerns in a just judicial system is not a reason for supplanting substantive state policies. Second, certainly as a practical matter, resting assertions of federal judicial power on so vague an interest as "justice" would eviscerate *Erie* completely and thus ignore its constitutional underpinnings. Third, this Court itself already has rejected a similar interest in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). In that diversity case, the plaintiff argued, *inter alia*, that the federal court's equitable powers and discretion constituted an exception to *Erie* and that, therefore, the federal court was not bound by a state statute of limitations. The Court, in rejecting the plaintiff's claim stated:

> But since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

Id. at 108-09. A federal court's interest in "doing equity" is analogous to its interest in "doing justice." It is doubtful that this Court in *Guaranty Trust* would have displaced state law if the plaintiff additionally had shown

that the applicable state statute of limitations was "unjust." Obviously, if justice could be used as a justification for the naked exercise of federal judicial power, this Court's oft-repeated assertion that the instances in which federal common law governs are "few and restricted" no longer would be true. *Cf. Texas Industries, Inc., supra,* at 640 (denying rights of contribution against antitrust co-conspirators).

Finally, petitioners' cavalier request that this Court fashion a federal common law in the context of asbestos litigation ignores enormous pragmatic obstacles. There is no easily applied governing principle for imposing federal common law in this context. Although plaintiffs' recovery depends in large part on the availability of punitive damages and the scope of the actionable injury, many other aspects of the litigation simlarly play a significant role in determining the size of potential awards. The applicable limitations period for bringing an action, for example, has a direct impact on aggregate recovery and thus the availability of funds for future claimants. The truth is that, once the need to limit plaintiffs' recoveries is used to justify the creation of federal substantive rules precluding the recovery of punitive damages and narrowing the scope of the actionable injury, there is no principled means of restricting the application of federal common law to other matters, either in the context of asbestos litigation or in other contexts. As a consequence, federal courts would become increasingly responsible for establishing a general federal tort law in a manner inconsistent with the teachings of *Erie* and the logic behind our federal system. *Cf. Parratt v. Taylor,* 451 U.S. 527, 544 (1981) (due process clause not intended to be "a font of tort law

to be superimposed upon whatever systems may already be administered by the States") (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

Moreover, displacing state law in asbestos cases would require federal courts to reexamine the major issues and principles involved in asbestos litigation, most of which are presently settled under state tort law. As a result, the progress of currently pending asbestos cases through the federal court system would come to a virtual standstill. The need to ensure quick resolution of the claims militates strongly against taking such action. In sum, this case simply is not an appropriate one for the creation of federal common law because a uniquely federal interest is absent and the practical problems that would attend the displacement of state law are insoluble.

2. Considerations Of Federalism And Separation Of Powers Require The Rejection Of Creating A Federal Common Law Of Asbestos Litigation And Further Review Of The Decision Below Is Unnecessary.

Basic principles of federalism and separation of powers support the decision below not to create the broad federal common law requested by petitioners, making further review by this Court unnecessary. Absent congressional authorization to do so, the federal courts should not resort to federal common law every time they think a gap in the law existed or believe it desirable to do so. "Every exercise of federal common lawmaking power takes away from powers of states." Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv.L.Rev. 883, 926 (1986). Expansion of federal common law reduces the ambit in which state law can operate; it diminishes its

scope and demeans its importance. Concomitantly the creation of federal common law expands the jurisdiction of the federal courts, typically at the expense of state court jurisdiction, which violates the principle that Congress should determine the business of the federal courts.

This Court's insistence that there be "congressional authorization to formulate substantive rules of decision," reflects the view that it is appropriate for Congress to adjust the federal-state balance and inappropriate for the federal courts to enlarge federal power and thereby diminish the states' authority. As a distinguished commentator has observed recently:

> Our system has been that the balance between the states and the federal government is to be adjusted primarily through Congress, where state interests are represented, and not through the politically insulated federal judiciary. The history of the Constitution suggests that states were willing to cede powers to Congress because their interests were safeguarded there. Although some of the protections that originally existed have been displaced, by subsequent constitutional and other changes, the point nonetheless remains valid that state interests and viewpoints on particular issues are reflected in the Congress in ways that they cannot predictably be in the Supreme Court. For this reason, we have required, at least in name, that the decision to displace state law with federal law should be made by the Congress and not by the courts.

Field, supra, at 932-33.

Moreover, Congress is in a far better position to create a new body of law than the courts, especially in the mass tort field with its need for economic policy making and political overtones. Congress is able to act on a com-

prehensive, systematic, and comparatively uniform basis, whereas the courts must act in an interstitial fashion. Congress' investigative and fact-finding capacities stand in sharp contrast to the limitations imposed on the judiciary by the facts of individual cases and the information supplied by the courts by particular litigants. Nor do the federal courts have Congress' ability to maintain oversight or resort to an administrative delegation, should that seem wise. As the judges of the Fifth Circuit wisely recognized, there is little to commend the federal courts "going first" to displace state law on the scale suggested by petitioners.

That there is no "congressional authorization to formulate substantive rules of decision," *Texas Industries*, 451 U.S. at 641, for tort actions in general, or mass torts or even asbestos litigation in particular is obvious. Petitioners cite none nor can they rely on the Commerce Clause since that provision of the Constitution has never been interpreted to permit the generation of federal common law when congress has not acted. Early in our history it was determined that congressional silence in the interstate commerce context left the states free to act unless Congress' inaction could be construed as a mandate to leave the area totally unregulated. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851). See also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824).

The court below wisely understood the federalism and separation of powers concerns that underlie every question of federal common law, let alone one with the massive implications presented by the petitioners' argument in this case. Its rejection of the invitation to federalize a mas-

sive area of state tort law is the only acceptable response and requires no further review or delay.

Although federal common law may at times be a "necessary expedient," *Milwaukee II, supra,* at 314 (quoting *Committee for Considerations of Jones Falls Sewage System v. Train,* 539 F.2d 1006, 1008 (4th Cir. 1976) (en banc)), under our federal system Congress is generally the body responsible for balancing competing interests between the states and the federal government and setting national policy. Whatever the need for federal legislation in the field of asbestos litigation may be, Congress' silence on the matter hardly authorizes the federal judiciary to assume for itself the responsibility for formulating what essentially are legislative solutions. Displacement of state law is primarily a decision for Congress, and Congress has yet to act. See *Miree, supra,* at 32. Accordingly, the decision below should be allowed to stand.

3. Certiorari Should Be Denied Because It Would Be Extremely Unwise For This Court To Legislate A Federal Common Law Of Asbestos Litigation As The Problem Is Best Dealt With By Other Means.

Implicitly acknowledging the difficulties of creating a federal law of torts that can be contained to asbestos litigation, the petitioners have drafted a five-part statute that they suggest be enacted by this Court. (Pet. 21-29) Its obvious ambiguities and porousness demonstrate how ill-conceived it would be for this Court to embark on a law-making odyssey of the suggested magnitude without any of the resources and fact-finding abilities of Congress. Moreover, petitioners' "criteria" are likely to engender endless litigation as to the applicability, creating signifi-

cant risks of inconsistency of treatment, inordinate delays and expenditures to adjudicate issues having nothing to do with the merits of litigation, and heightened confusion and instability. Questions abound. What constitutes a "substantial probability that dissipation of limited funds * * * will foreclose the opportunity for recovery of compensation by subsequent claimants"? (Pet. 21) When does an interstate contest for funds "clearly affect * * * the extent of recovery available to * * * others"? (Pet. 23) When "does the case implicate other cognizable federal interests"? (Pet. 27) Finally, totally ignored by petitioners in their frenetic search for The Magic Bullet to cure the malady of asbestos litigation are considerations of federalism and the legitimate interests of states in deterring and punishing certain forms of conduct within their borders.

A far more appropriate course for this Court to follow is to deny this petition and allow Congress to formulate national policy concerning asbestos litigation, if it deems it wise to do so. In the interim, there is considerable evidence that the courts—both state and federal—are making progress in meeting the challenge of the asbestos cases in a variety of rational ways that are far less drastic and damaging to Our Federalism than creating a federal law of torts by judicial fiat. Claims are being collectivized by so many courts through effective and innovative consolidation and class action techniques. See e.g., *In re Asbestos School Litigation*, slip op. no. 84-1642 (3d Cir. May 1, 1986); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986). Cases are being disposed of more rapidly through settlement and increased pressure toward trial.

There is a growing recognition that punitive damages must be calibrated with reference to the defendant's conduct toward the particular plaintiff and bear some relationship to the compensatory damages being awarded and that trial judges must exercise control to achieve that end. See, e.g., *Thirty v. Armstrong World Indus.*, 661 P.2d 515, 518 (Okla. 1983). Finally, an increasing number of courts have indicated that whatever the legitimacy of punitive damages may be, they should be used to "hurt, but not bankrupt a defendant." *Wynn Oil Co. v. Purolator Chem. Corp.*, 403 F.Supp. 226, 232 (M.D. Fla. 1974) (Florida law). See also *National Bank of Monticello v. Doss*, Nos. 4-85-0068, 4-84-0271 (III. App. Ct. March 19, 1986); *Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 693 P.2d 348 (Ariz. Ct. App. 1984). The proper role for this Court is to continue to function as an appellate tribunal, rather than as a legislature, to guard against violations of constitutional principles and other fundamental precepts of American justice. Further review of this action is unnecessary.

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CONCLUSION

Respondent urges this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and to allow its mandate to become effective.

Respectfully submitted,

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